

1 It was your policy to call up and ask questions
2 concerning -- of the nature of the questions in which you
3 posed to Mr. Stewart?

4 THE WITNESS: Yes.

5 JUDGE CHACHKIN: Could you tell me what individual
6 case you did that with, a case which had been in litigation?

7 THE WITNESS: I am not aware of specific cases. I
8 do have recollection of discussing a -- I don't know
9 whether -- I do have a recollection of discussing cases
10 concerning -- well, I'm sorry. I just don't have a specific
11 recollection of any part particular cases. I have
12 situations in which I remember discussing matters with
13 people at the FCC involving situations.

14 I remember one in South Carolina where there was
15 some allegations of a station owner that may have engaged in
16 some inappropriate behavior involving advertising matters in
17 South Carolina, and there had been complaints from
18 businesses in that community about the actions of a
19 particular licensee. I remember calling to discuss that
20 particular case with the Commission.

21 JUDGE CHACHKIN: Do you remember what you
22 discussed with the Commission? Did it go beyond when action
23 could be expected on that matter?

24 I mean, what I consider a status inquiry.

25 THE WITNESS: Did it go beyond?

1 JUDGE CHACHKIN: Did it go beyond that, yes,
2 discussing the nature of the complaint?

3 THE WITNESS: Well, we would discuss on occasion
4 what, if any -- I would often get requests from people as to
5 what action they should take next in a proceeding.

6 I think in that particular case in South Carolina
7 I discussed what the appropriate course of action would be
8 for those parties who had concerns with the FCC. And I
9 believe I informed them that, you know, they would have to
10 file something with the Commission in that case.

11 I also recall discussing with the Commission other
12 cases where there have been decisions that may have had an
13 impact or been a result -- a result in what could be
14 interpreted as a change in policy, to discuss with them, you
15 know, what impact that would have going forward on a
16 particular issue.

17 JUDGE CHACHKIN: And your testimony is that before
18 you made these calls you didn't make any ascertainment as to
19 whether the ex parte rules applied, and whether this was a
20 restricted proceeding or not, and the appropriateness of you
21 making such inquiries?

22 THE WITNESS: No, unless -- the only time I can
23 think of when I would do that is if I was aware that the
24 parties were in litigation with another party over a
25 specific issue. Then, you know, I might have in fact raised

1 that with the Commission.

2 But as a general matter the Commission would
3 usually tell -- the Commission staff would usually tell me
4 right off the bat whether or not they believed, if they
5 believed there was an ex parte issue.

6 JUDGE CHACHKIN: Did Ms. Polivy mention to you
7 that there was another party, Press, which had filed
8 objections to the extension request?

9 THE WITNESS: I don't recall that. I don't
10 recall, I don't recall that.

11 JUDGE CHACHKIN: So have you ever heard of the
12 name Press Broadcasting as being involved in this
13 proceeding?

14 THE WITNESS: I do believe, and, again, you know,
15 I apologize, Your Honor, that I am not clear on specifics.
16 I have been aware of the fact that there was litigation
17 between RBC and Press involving a tower site.

18 JUDGE CHACHKIN: And when --

19 THE WITNESS: And I think I may have known about
20 that prior to June of 1993.

21 JUDGE CHACHKIN: But insofar as Press filing
22 petitions for reconsideration and objection, informal
23 objection, Ms. Polivy did not inform you of that?

24 THE WITNESS: No.

25 JUDGE CHACHKIN: Any redirect?

1 MR. EISEN: A couple of questions.

2 REDIRECT EXAMINATION

3 BY MR. EISEN:

4 Q Can you give us a date when you left Wiley Rein?

5 A March of 1987.

6 Q Was that usual in your capacity as a senior
7 counsel to the committee to call the FCC and ask for the
8 rationale of a decision?

9 A No, it wasn't.

10 Q Did you consider that to be a status inquiry?

11 A Yes, particularly once the FCC had made a
12 decision, then, you know, it wasn't -- I did not believe
13 that it was -- you know, the decision had been made, and I
14 always thought it would be appropriate to ask them why they
15 reached a particular conclusion.

16 MR. EISEN: That's all I have.

17 JUDGE CHACHKIN: Any further questions?

18 RECROSS-EXAMINATION

19 BY MR. COLE:

20 Q Ms. Bush, did you have any reason to believe that
21 when the FCC issues an opinion it sets forth the rationale
22 for a decision, that that does not clearly and accurately
23 state what the Commission's rationale for that decision is?

24 A As a general matter, it does, but that doesn't
25 necessarily mean that there aren't additional questions that

1 are not answered by it that might be worth discussing.

2 Q Such as? Can you give me an example of that?

3 MR. EISEN: Objection. It's a vague and unclear
4 question. Is he referring specifically to this contact or
5 the whole universe of times that Ms. Bush made a contact
6 with the Commission about decisions that had been made?

7 MR. COLE: Mr. Eisen on redirect asked a very
8 broad question about whether it is unusual for her to call
9 the FCC and ask about the rationale of the FCC's decisions.
10 It seems to me it's a striking proposition given the fact
11 that that's why the FCC writes opinions. And I am entitled
12 to ask her why it is that she believes it's necessary to
13 seek further information about the rationale of public
14 opinion, and also what it is about -- or what it is that she
15 has found, to the extent that she has made such calls.

16 JUDGE CHACHKIN: The objection is overruled.

17 Go ahead, Mr. Cole.

18 THE WITNESS: Well, I mean, I think oftentimes
19 there are decisions that the FCC reaches that are discussed
20 not only with people at the FCC but, you know, just amongst
21 members of the Bar as to what the implications of that
22 decision are, what the implications are on other cases; you
23 know, precedential value of it.

24 I at the time I spoke to the Commission had not
25 read the letter in that case, so I didn't have the benefit

1 of reviewing it at that time.

2 BY MR. COLE:

3 Q So is it safe to say that as of that time you had
4 no idea whether the rationale of the decision was fully and
5 completely and sufficiently stated in the Kreisman letter?

6 A I didn't know what was in the letter. I mean,
7 other than the conclusion, I did not know the specifics of
8 that letter.

9 MR. COLE: I have no further questions, Your
10 Honor.

11 JUDGE CHACHKIN: You are excused then.

12 THE WITNESS: Thank you.

13 (Witness excused.)

14 JUDGE CHACHKIN: All right, I guess what we are
15 going to do for the remainder of the time this morning as
16 long as it takes is to discuss exhibits which do not require
17 testimony of any witnesses, at least no witnesses have been
18 proffered to testify in connection with these exhibits.

19 MR. EISEN: Your Honor, I'm sorry.

20 JUDGE CHACHKIN: Yes.

21 MR. EISEN: I understood when we broke last
22 evening conceivable do that, and I was wondering whether or
23 not you can now take Mr. Rey's testimony with regard -- at
24 least with respect to the ex parte issue.

25 JUDGE CHACHKIN: Is Mr. Rey here?

1 MR. EISEN: Oh, yes.

2 MR. CONANT: Yes, sir.

3 JUDGE CHACHKIN: Oh, I -- didn't we understand
4 there was going to be one -- oh, that was the next --

5 MS. POLIVY: But that was a different issue.

6 JUDGE CHACHKIN: Well, I don't think it's a good
7 idea -- well, I will ask the parties how they feel about it
8 since they are --

9 MR. COLE: Your Honor, I would just as soon put
10 Mr. Rey on the stand when, you know, when we do Mr. Rey all
11 the way through because I have a number of questions that
12 may not relate directly to the ex parte issue. And I would
13 just as soon do it all at one time.

14 JUDGE CHACHKIN: So you have your choice of
15 putting Mr. Rey on and having him testify until he completes
16 it, or having Mr. Conant co on this afternoon.

17 MR. EISEN: So you are rejecting our proposal that
18 Mr. Rey --

19 JUDGE CHACHKIN: Well, the parties have a right to
20 cross-examination. They don't want to break it up. I think
21 it's reasonable that you have a man testify that we complete
22 his testimony rather than break it up under issues.
23 Sometimes it's difficult to say, well, one issue beings, one
24 issue ends. So we have our choice now.

25 MR. EISEN: The testimony is not going to be very

1 lengthy, Your Honor. It just seems to me it would expedite
2 the hearing if we moved forward on it. He is here and ready
3 to testify. I can't imagine that his testimony is going to
4 take a very long time.

5 JUDGE CHACHKIN: Well, I will leave it up to the
6 parties. If the parties have no objection, then it's all
7 right with me. If they do object, then I --

8 MR. COLE: Then, Your Honor, I would request that
9 we take Mr. Rey all the way through. It seems that have at
10 least some time to spend on the written exhibits in terms of
11 redacting them or discussing objections to the exhibits, and
12 I think the time could be spent right now since we have only
13 an hour and a half, two hours.

14 JUDGE CHACHKIN: What is the staff's view?

15 MR. SILBERMAN: The staff believes that we should
16 go into the exhibits, have them marked, and go through
17 because we have a number of objections to portions of the
18 exhibits. And then Mr. Conant can be examined this
19 afternoon. I think he can be completed this afternoon, and
20 maybe start Mr. Rey this afternoon and go forward then
21 tomorrow and Friday.

22 MR. EISEN: Now, the difficulty with it is we have
23 both burdens in the proceeding, and I think we should have
24 some leeway in the way the case is tried too.

25 JUDGE CHACHKIN: I understand that. I have given

1 you the -- you can either have Mr. Conant go on after we
2 complete Mr. Rey, but the parties have a right, it seems to
3 me, in their cross-examination, if they wish to conduct a
4 complete cross-examination.

5 MR. EISEN: Well.

6 JUDGE CHACHKIN: As I say, if you want Mr. Rey to
7 testify, he will testify until we complete Mr. Rey, and then
8 we will put Mr. Conant on. You have your choice.

9 MR. EISEN: One minute.

10 JUDGE CHACHKIN: Yes, we will go off the record.

11 (Pause off the record.)

12 MR. EISEN: Your Honor, we would accede to the
13 parties' request, and we will discuss exhibits now.

14 JUDGE CHACHKIN: All right.

15 MR. EISEN: We will put Mr. Rey on later.

16 JUDGE CHACHKIN: Okay, we will get to Mr. Rey
17 sometime this afternoon.

18 MR. BLOCK: Your Honor, may I be excused for this
19 session? I have some other things to do.

20 JUDGE CHACHKIN: Yes.

21 MR. BLOCK: Thank you.

22 JUDGE CHACHKIN: All right.

23 MR. EISEN: Are we off the record?

24 JUDGE CHACHKIN: No, we are on the record, not off
25 the record.

1 MR. EISEN: In light of the fact that we are going
2 directly into exhibits now, could we take just a couple of
3 minutes to --

4 JUDGE CHACHKIN: All right, we will take a short
5 recess.

6 MS. POLIVY: And, Your Honor, shortly I will ask
7 to be excused as well.

8 JUDGE CHACHKIN: All right. We are off the
9 record.

10 (Whereupon, a recess was taken.)

11 JUDGE CHACHKIN: We are going to take them up in
12 order, I assume. Exhibit 2, is that where we are?

13 MR. EISEN: Yes. Exhibit 1 has been received,
14 Your Honor?

15 JUDGE CHACHKIN: Exhibit 1 has been received, yes,
16 Rainbow Exhibit 1 is received.

17 And the next one is Rainbow Exhibit 2, and I
18 assume you are offering Rainbow Exhibit 2.

19 Do you want to state the reasons for the offering,
20 the basis for the offering, Mr. Eisen.

21 MR. EISEN: Well, in each of the affidavits that
22 we supply in Exhibit No. 2 there is sworn relevant testimony
23 with regard to the telephone calls and/or the July 1, 1993
24 meeting.

25 I also think there is relevance to the entire --

1 all of the three affidavits that have been submitted are
2 with regard to the facts and circumstances surrounding the
3 ex parte issue. I am particularly concerned if indeed Press
4 requests that Mr. Gordon be allowed to testify as a rebuttal
5 witness on, and I would be very concerned if we were
6 foreclosed at that time from using these affidavits to show
7 that, as I understand Mr. Gordon's testimony, that testimony
8 did not comport with the understandings of --

9 JUDGE CHACHKIN: In what respect?

10 MR. EISEN: In everything that we have understood
11 from Mr. Gordon: with regard to whether or not he made
12 inquiries about the ex parte rule; what is the basis of his
13 belief for what the ex parte violation was; what he said to
14 Ms. Polivy; what Ms. Polivy said to him.

15 JUDGE CHACHKIN: Well, when Mr. Gordon testifies
16 if you want to try to impeach him, you can use any material
17 that you have to impeach him. If you want to put on
18 witnesses to -- surrebuttal of Mr. Gordon, you can attempt
19 that. But we are at the stage now of your direct case, and
20 that's what we are dealing with now.

21 And I agree with you that insofar -- well, first
22 of all, these individuals have been deposed, have they not?

23 MR. EISEN: They have.

24 JUDGE CHACHKIN: So why are we putting in material
25 affidavits if they gave -- when we have had depositions

1 taken of them at which all the parties participated?

2 MR. EISEN: Well, they are consent statements made
3 close to the time the events occurred, and I think they help
4 advance the record to at least the matters we have discussed
5 regarding the telephone calls, the telephone contacts and
6 the meeting in Mr. Stewart's office.

7 JUDGE CHACHKIN: But much of these affidavits also
8 deal with discussions by and between the staff.

9 MR. EISEN: Yes, and I understand your position on
10 that matter, Your Honor. And you have already told us what
11 you would be willing to consider should Mr. Gordon testify
12 as a rebuttal witness, and I accept that at this point.

13 That said, as I indicated, there are other
14 portions of these affidavits that do deal with other things.

15 JUDGE CHACHKIN: Mr. Cole?

16 MR. COLE: Well, Your Honor, I think my own
17 reaction is, as I stated before, the deposition testimony of
18 Ms. Kreisman and Messrs. Stewart and Pendarvis is relevant,
19 and I intend to offer that as rebuttal.

20 My view on the affidavits is that there are
21 probably very minimal portions of each affidavit that may be
22 relevant to the issue to which they have been interpreted in
23 this case, and on that basis I have no objection to those
24 very limited portions coming in.

25 But I agree with what I believe is Your Honor's

1 observation that there is substantial portions of these
2 statements which have nothing to do with anything relating
3 to this proceeding.

4 JUDGE CHACHKIN: Well, what portions don't you
5 object to?

6 MR. SILBERMAN: Your Honor, may I just speak
7 generally?

8 JUDGE CHACHKIN: Yes, Mr. Silberman.

9 MR. SILBERMAN: Thank you, Your Honor.

10 JUDGE CHACHKIN: Yes.

11 Well, I was going to get to you.

12 MR. SILBERMAN: It's not only Your Honor but the
13 Commission letter authorizes depositions of the -- the
14 Commission staff in its order FCC 96-213, released May 13,
15 1996, where the Commission talks about what would be
16 relevant and what would not be relevant. And it's relevant
17 if it was two-way conversation between Rainbow, or its
18 counsel and the staff. But it's not going to be relevant if
19 it was not communicated to either Rainbow or counsel. Based
20 on that it's beyond the scope of issues, number one.

21 The staff believes that there are portions of
22 these affidavits which are clearly not objectionable because
23 they are relevant to the issue, but there are portions which
24 are objectionable because they are not relevant under the
25 issue as determined by Your Honor and by the Commission.

1 And we have, meaning Stewart Block and I, have
2 gone through this exhibit or these affidavits in Exhibit No.
3 2, which has been identified as Exhibit No. 2. And we would
4 be glad to go paragraph by paragraph to show what we believe
5 would be relevant and what would not be relevant.

6 JUDGE CHACHKIN: All right, why don't we do that.
7 Well, it's take it page by page.

8 MR. SILBERMAN: We have no objection to page 1.
9 Page 1 is the cover page, cover page of Barbara Kreisman's.
10 We can go to page 2, Your Honor, which is the first page of
11 Barbara Kreisman's affidavit.

12 JUDGE CHACHKIN: Page 2, yes.

13 Page 3, you mean?

14 MR. SILBERMAN: Page 2 of the exhibit.

15 MR. EISEN: The cover page was --

16 JUDGE CHACHKIN: That's not part of the exhibit.

17 MR. SILBERMAN: I'm sorry.

18 JUDGE CHACHKIN: All right, page 1 of the
19 affidavit.

20 MR. SILBERMAN: Right, page 1 of the affidavit is
21 page 2 of the exhibit for the record.

22 JUDGE CHACHKIN: Right.

23 MR. SILBERMAN: Do you want me to speak to this?

24 JUDGE CHACHKIN: Well, I don't know. If you and
25 Mr. Cole have --

1 MR. SILBERMAN: I don't know if we have consistent
2 view or not on this.

3 JUDGE CHACHKIN: Do you have any objection, Mr.
4 Cole, if we go forward first with Mr. Silberman's
5 objections?

6 MR. COLE: No, I have none.

7 MR. SILBERMAN: I would just propose the first
8 paragraph is fine. The rest of the page is irrelevant,
9 including the footnote.

10 JUDGE CHACHKIN: All right.

11 MR. COLE: Your Honor, to the extent that we are
12 doing it page by page, Press concurs with that evaluation.

13 JUDGE CHACHKIN: Let's go to page 3.

14 MR. SILBERMAN: Page 3, the entire upper portion,
15 paragraph four and continues is irrelevant, in our view.
16 Paragraph five is irrelevant. Paragraph six, the first
17 parenthetical in the first sentence from the word "clarify"
18 to "matter" is irrelevant. We have no objection to the rest
19 of the sentence going in. "I recall that Mr. Pendarvis had
20 related to me Mr. Gordon's query as to whether the
21 proceeding may have been restricted, and that Mr. Stewart
22 should be so advised."

23 We object to the next several sentences until --

24 JUDGE CHACHKIN: Now, wait a minute. Paragraph
25 six now, which portion --

1 MR. SILBERMAN: We have no objection to the second
2 part of the first sentence going into the record.

3 JUDGE CHACHKIN: Which states what, "I recall"?

4 MR. SILBERMAN: "I recall that Mr. Pendarvis had
5 related to me Mr. Gordon's query as to whether the
6 proceeding may have been restricted, and that Mr. Stewart
7 should be so advised."

8 We object to the next several sentences until it
9 picks up again, "I also now recall that just before the
10 meeting on July 1 Messrs. Pendarvis and Gordon stopped by my
11 office and inquired whether the attorney for Press
12 Broadcasting Company would attend the meeting," we have no
13 objection to that.

14 We do object to the next sentence, "I replied,"
15 which is irrelevant.

16 Seven, we object to -- I'm sorry.

17 MR. SILBERMAN: Do you want to go --

18 JUDGE CHACHKIN: Let's do --

19 MR. SILBERMAN: -- one by one and then Mr. Eisen
20 should be able to speak to this.

21 JUDGE CHACHKIN: Well, but what I would prefer you
22 to do is state - it might be easier to state which portions
23 you do not object to.

24 MR. SILBERMAN: Okay, I am going to tell you what
25 I don't object to.

1 JUDGE CHACHKIN: Because that's --

2 MR. SILBERMAN: Okay, going to page 4, paragraph
3 seven we object to, paragraph eight. We have no objection
4 to the sentence one, two, and three. We object to the next
5 two sentence where it's stated, "Mr. Stewart appeared
6 troubled by the fact," and ending, "indeed, neither had I
7 been informed of that fact," we object to that. We do not
8 object to the rest of the paragraph, "I can also remember a
9 passing reference."

10 JUDGE CHACHKIN: Which is the portion again that
11 picks up where you do not object?

12 MR. SILBERMAN: We do not object, we do not object
13 to the rest of the paragraph eight on page 4 which begins,
14 "I can also remember a passing reference at the meeting to
15 the fact that." We believe the rest of the paragraph is
16 irrelevant because it accounts her memory of the meeting.

17 Paragraph nine we object to. Paragraph 10 we
18 object to.

19 All of page 5 we object to. And page 6 we object
20 to everything except the final paragraph which -- in which
21 she swears that the foregoing information is true and
22 correct to the best of her knowledge and belief.

23 JUDGE CHACHKIN: You don't object to paragraph
24 six? Oh, you do object to paragraph six?

25 MR. SILBERMAN: We object, yes.

1 JUDGE CHACHKIN: Oh, I see.

2 MR. SILBERMAN: On relevance grounds.

3 JUDGE CHACHKIN: I understand.

4 All right, now, Mr. Cole, do you have any
5 additional objections?

6 MR. COLE: No, Your Honor.

7 JUDGE CHACHKIN: All right, Mr. Eisen.

8 MR. EISEN: Your Honor, turning back to paragraph
9 six for a moment, and with regard to Mr. Silberman's
10 specific reference to the second sentence of that paragraph.

11 How are we supposed to show the reasonableness of
12 our position if we can't demonstrate that members of the
13 staff shared our views?

14 I mean, that places us at a tremendous
15 disadvantage.

16 JUDGE CHACHKIN: Well, I have already indicated to
17 you what the staff believes is irrelevant unless it was
18 communicated to you.

19 MR. EISEN: But that's not --

20 JUDGE CHACHKIN: If it wasn't communicated to you
21 could not have affected the state of mind of any of the
22 principals or agents.

23 MR. EISEN: The very fact that the meeting took
24 place and the telephone discussions occurred shows the state
25 of mind of the Commission employees who were involved.

1 JUDGE CHACHKIN: Well, insofar as there were
2 discussions where Rainbow participated, that is relevant to
3 state of mind, and that is certainly admissible. Insofar as
4 the staff discusses among themselves the appropriateness of
5 whether ex parte rules apply, that is irrelevant to the
6 state of mind of Rainbow.

7 MR. EISEN: Why is it irrelevant?

8 JUDGE CHACHKIN: Because Rainbow -- the issue is
9 not whether there was an ex parte violation. The issue is
10 whether, as the issue is framed, whether intended to violate
11 the ex parte rules, and there is nothing -- the fact that
12 the staff may or may not believe -- may have believed that
13 there wasn't a violation of the ex parte rules has no
14 bearing on the intentions of Rainbow, and could not unless,
15 the only way it could affect Rainbow's state of mind is if
16 it was communicated to Rainbow in some --

17 MR. EISEN: But the actions that were taken by the
18 staff result in the communication. That's what it is. I
19 mean, there was no reason for Ms. Polivy to believe that
20 there was any violation of the ex parte rules so long as the
21 staff is inviting her to meet, and so long as the staff had
22 formed that opinion.

23 JUDGE CHACHKIN: For that matter all that Ms.
24 Polivy could rely on is what was said to her. And to the
25 extent that she initiated the meeting has a bearing on the

1 intent.

2 MR. EISEN: But the fact that they agreed to meet
3 with Ms. Polivy also has a bearing on this.

4 JUDGE CHACKIN: Well, insofar as they agreed to
5 meet and it was communicated to Ms. Polivy, that's in
6 evidence. That's permissible.

7 Insofar as the staff may have believed whatever it
8 believed, there is no way that was communicated to Ms.
9 Polivy or could have affected her actions.

10 MR. EISEN: By virtue of the meeting on July 1,
11 1993, I believe that the staff did convey to Ms. Polivy
12 their belief that there was no violation. And I don't think
13 there is any way that we can reasonably show that we acted
14 in good faith without evidence with regard to the Commission
15 staff.

16 JUDGE CHACKIN: Well, I disagree with you and the
17 Commission disagrees.

18 MR. EISEN: But the Commission disagreed with us
19 on discovery.

20 JUDGE CHACKIN: Well, the same thing, the scope
21 of the issue is -- it applies to the hearing. In fact,
22 discovery is even a wider latitude than the actual
23 evidentiary portion of the hearing.

24 MR. EISEN: I think it places us at a tremendous
25 disadvantage.

1 JUDGE CHACHKIN: Well, I don't see how it places
2 you at any dis -- it doesn't explain --

3 MR. EISEN: I understand your position --

4 JUDGE CHACHKIN: The issue is --

5 MR. EISEN: -- is but I disagree.

6 JUDGE CHACHKIN: The issue is why Ms. Polivy
7 contacted Ms. Bush for the purpose of calling the
8 Commission. The issue is why Ms. Polivy initiated the call
9 to make -- to have the meeting. That's the issue, the
10 reasons why Ms. Polivy did so. Did she do so intentionally
11 knowing it was a violation of ex parte rules? That's the
12 issue. What the staff did is irrelevant to that issue.

13 MR. EISEN: We disagree.

14 JUDGE CHACHKIN: Well, of course you disagree.

15 MR. EISEN: We think it's critical as a matter of
16 fact.

17 JUDGE CHACHKIN: Well, I don't see how it could
18 have any bearing on Ms. Polivy's actions.

19 MR. EISEN: Okay.

20 MR. SILBERMAN: We have stated our objections to
21 Exhibit 2, the Kreisman affidavit.

22 JUDGE CHACHKIN: Well, Mr. Eisen, do you have
23 anything further to state?

24 The only portions I am going to allow in are those
25 which relate to communications between members of the staff

1 and Ms. Polivy or other principals of Rainbow. That's the
2 only thing that's relevant to the issue as framed by the
3 Commission.

4 MR. SILBERMAN: Well, I think it would be helpful
5 for the record, Your Honor, to go through it and say what is
6 being admitted and what is not so that we may prepare --

7 JUDGE CHACHKIN: Well, I certainly will do that.
8 I am just indicating generally what my position is.

9 Now, I don't know, Mr. Eisen, if you want to put
10 in that, or it's your choice, or not put in an part of the
11 affidavit.

12 MR. EISEN: No, I do want the affidavit in.

13 JUDGE CHACHKIN: Well, I indicated the portions I
14 am going to receive. They only relate to whether there were
15 communications between the staff and the principals or
16 agents of Rainbow.

17 MR. EISEN: And we have noted our objection and
18 it's a continuing objection with regard to each of these
19 affidavits that comprises this exhibit.

20 JUDGE CHACHKIN: All right. Then I am prepared to
21 rule then.

22 The portions which are not objected to are the
23 first paragraph on page 2, and that material will be
24 received.

25 Now, I have difficulty in understanding what the

1 relevance is on page 3 of paragraphs six portions you want
2 to offer.

3 MR. SILBERMAN: Your Honor, those are for the
4 limited purpose that there was testimony, I believe, of Ms.
5 Polivy that she had no conversations with Mr. Gordon on the
6 merits of the case.

7 MS. POLIVY: That's not my position.

8 MR. SILBERMAN: You can respond.

9 MS. POLIVY: No, I'm sorry.

10 MR. SILBERMAN: That she doesn't recall or she
11 denies that he said to her "This is a restricted proceeding
12 and I can't talk about the merits."

13 This goes to credibility of Mr. Gordon as to
14 whether he at the time believed this was a restricted
15 proceeding.

16 JUDGE CHACHKIN: You have no objection to that,
17 Mr. Eisen?

18 MR. EISEN: No, I have no objection to that.

19 JUDGE CHACHKIN: To the statement involving Mr.
20 Gordon?

21 MR. EISEN: Well, that's true. Mr. Gordon hasn't
22 testified. Mr. Cole indicates that he plans to call him as
23 a rebuttal witness. Maybe we ought to defer this until Mr.
24 Gordon does testify, should he testify.

25 JUDGE CHACHKIN: This is your exhibit. The

1 question is do you have any objection to the statement
2 coming in in paragraph six --

3 MR. EISEN: It is my exhibit, Your Honor, that's
4 correct. I think I would prefer that if it did come in that
5 it come in after Mr. Gordon is sworn as a witness.

6 JUDGE CHACHKIN: Well, if there is -- it's your
7 exhibit, but if there is an objection to this portion coming
8 in without the remaining of the material coming in, then I
9 will sustain your objection.

10 MR. EISEN: Okay.

11 JUDGE CHACHKIN: Is that correct?

12 MR. EISEN: Yes, as long as you understand that my
13 objection continues, and to simply parse this exhibit with a
14 few relevant areas that you think are relevant is --

15 JUDGE CHACHKIN: Well, as I say, I think -- I
16 think that not allowing this testimony in is consistent with
17 my ruling that the only thing that's relevant is the
18 communications between Rainbow and the staff.

19 MR. SILBERMAN: So the entire paragraph --

20 JUDGE CHACHKIN: So the entire paragraph will not
21 be received, yes.

22 So all I have received so far is merely the
23 introductory paragraph, paragraph one.

24 MR. SILBERMAN: Consistent with your ruling, Your
25 Honor, I would suggest that paragraph, paragraph eight on

1 page 4.

2 JUDGE CHACHKIN: Yes.

3 MR. SILBERMAN: Deals with eye witness testimony,
4 except for the sentence that we have objected to which I
5 will refer to in a minute, most of the paragraph eight is
6 okay with us because it recounts Ms. Kreisman's memory of
7 what happened at the meeting.

8 We object to the sentences, "Mr. Stewart appeared
9 troubled by the fact," and "indeed, neither had I been
10 informed of that fact" as irrelevant under the issues.

11 JUDGE CHACHKIN: You --

12 MR. SILBERMAN: We object to the sentences, let's
13 see, I think it's the third and fourth sentences of
14 paragraph. The remainder of the paragraph is fine with us.
15 Consistent with your ruling, I don't think that is a
16 relevant matter.

17 Whether he appeared troubled, I don't know what
18 the basis, I don't know if Mr. Kreisman is --

19 MR. EISEN: But it could --

20 MR. SILBERMAN: -- qualified to testify to that.

21 MR. EISEN: -- be it had something to do with her
22 perception of what occurred at the July 1st meeting. I
23 think it's relevant.

24 JUDGE CHACHKIN: Well, I don't know what you mean,
25 I don't know what it means "appeared troubled." Did Mr.